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No. 58515-1-I

IN THE COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

CURTIS A. BEAUPRE,

Plaintiff/Respondent,

vs.

PIERCE COUNTY,

Defendant/Appellant

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ANSWER TO
MOTION TO STRIKE

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**COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON**

CURTIS A. BEAUPRE,)
 Respondent,)
)
 vs.)
)
PIERCE COUNTY,)
 Petitioner.)

**ANSWER TO
MOTION TO STRIKE**

**I.
IDENTITY OF ANSWERING PARTY**

Curtis A. Beaupre, plaintiff in the trial court and respondent in this court, requests that the relief designated in section II be granted.

**II.
STATEMENT OF RELIEF SOUGHT**

That Pierce County's Motion to Strike be denied.

**III.
FACTS RELEVANT TO THE MOTION**

On May 19, 2006, the trial court heard oral argument on Pierce County's Motion for Summary Judgment, which was based primarily upon the Professional Rescuer Doctrine and Fireman's Rule. Beaupre defended against the motion both on

the merits, and on the grounds that the neither affirmative defense had been pled by Pierce County in its Answer and Affirmative Defenses, as required by the CR 12(b) and CR 8(c) of the Civil Rules for Superior Court. Beaupre's counsel also argued that Pierce County should have admitted to its reliance upon these affirmative defenses in response to Beaupre's discovery requests. The Judge then asked if Beaupre had served discovery requests directed toward discovering Pierce County's affirmative defenses. Beaupre's counsel responded that he had, opened and read the appropriate interrogatory, and offered to hand the interrogatories up to the court.

When counsel for Pierce County says that Beaupre's affirmative defense interrogatories and Pierce County's responses were not called to the attention of the trial court, he is in error.

Subsequently, when this became an issue on appeal, Beaupre filed a motion in the trial court, pursuant to RAP 7.2(b) and RAP 9.12, seeking to supplement the trial court's Order on Motion for Summary Judgment with the inclusion of Beaupre's First Discovery Requests and Pierce County's Responses Thereto

among the items called to the attention of the trial court before rendering its Order on Motion for Summary Judgment. Because they were only called to the attention of the trial court during oral argument, they had not listed in the proposed order offered by either party.

IV. **GROUND FOR RELIEF AND ARGUMENT**

Although counsel for Pierce County implies, at various points in his motion, that the trial court Judge denied Beaupre's motion because the interrogatories and responses had not been called to the attention of the trial court, that is simply not so. The trial court's order denying Beaupre's motion gives no reason at all for the court's ruling. (A copy of the trial court's order is attached as "Appendix A").

It may well be that the court did not find this evidence material to its ruling on the motion for summary judgment, since it decided the matter upon the merits of Pierce County's affirmative defenses rather than on Pierce County's failure to plead its affirmative defenses of the Professional Rescuer Doctrine and Fireman's Rule.

Certainly, Beaupre could have objected to the trial court's decision in this regard, pursuant to RAP 9.13, but Beaupre's counsel saw no need to do so, since Pierce County's failure to assert these affirmative defenses in response to Beaupre's discovery requests is clearly not an essential element of Beaupre's Motion on the Merits; rather, it is merely a "make weight" argument. It is the failure to plead these affirmative defenses in response to Beaupre's Complaint which results in Pierce County's waiver of both affirmative defenses. See *Farmers Insurance Company of Washington v. Miller*, 87 Wn.2d 70, 76, 549 P.2d 9 (1976); *Butler v. Joy*, 116 Wn.App. 291, 295, 65 P.3d 671 (2003); and *Lybert v. Grant County*, 141 Wn.2d 29, 38-40, 1 P.3d 1124 (1999).

In addition, Beaupre's Motion on the Merits is unrelated to the issue upon which the trial court chose to base its decision to deny Pierce County's Motion for Summary Judgment; but rather, is based upon this Court's right to sustain the trial court upon any ground supported by the pleadings and the proof. See *Fairwood Greens Homeowners v. Young*, 26 Wn. App. 758, 762, 614 P.2d 219 (1980).

As a result, Beaupre's Motion on the Merits need not be based solely on evidence considered by the trial court; but logically may also be based upon other pleadings and proof in the case. Beaupre's discovery requests and Pierce County's responses to those requests are certainly "proof" in the case.

Because discovery requests and responses to discovery requests are no longer filed with the court clerk, they can not be made a part of the record as clerk's papers. They are, however, none the less, "proof" which may be used by this Court to sustain the lower court "on any theory within the pleadings and proof." *LaPlante v. State*, 85 Wn.2d 154, 531 P.2d 299 (1975); even if the theory upon which the trial court is sustained is unrelated to the basis for the trial court's decision. *Eagle Pac. Ins. Co. v. Christensen*, 85 Wn. App. 695, 707, 934 P.2d 715 (1977); affirmed 135 Wn.2d 894, 959 P.2d 1052 (1998).

As a result, Beaupre should be allowed to call this "proof" to the attention of this Court by attaching such "proof" to his Motion on the Merits, as he has done.

It is noteworthy that nowhere does Pierce County contend that it did identify either the Professional Rescuer Doctrine or

the Fireman's Rule in its responses to Beaupre's discovery requests.

V.
CONCLUSION

Because this Court may sustain the trial court "on any theory within the pleadings and proof,"¹ and because the basis of Beaupre's Motion on the Merits is unrelated to the theory upon which the trial court denied Pierce County's summary judgment motion, Beaupre may call this Court's attention to, and this Court may consider "proof" not considered by the trial court.

Beaupre respectfully requests that Pierce County's Motion to Strike be denied.

DECLARATION OF SERVICE BY MAIL

The undersigned certifies that, on this date, he deposited in the mails of the United States of America a properly stamped and addressed envelope containing a true and correct copy of the document on which this certificate appears, addressed to counsel of record for each of the parties to this action.

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated January 11th, 2007 at Kirkland, WA.

Signature J.E. Fischnaller

Law Offices of
J.E. FISCHNALLER

By J.E. Fischnaller

J.E. Fischnaller (WSBA # 5132)
Of Attorneys for Respondent

¹ *LaPlante v. State*, 85 Wn.2d 154, 531 P.2d 299 (1975); *Thompson v. Thompson*, 82 Wn.2d 352, 510 P.2d 827 (1973).

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

CURTIS A. BEAUPRE,

Plaintiff,

NO. 04-2-23610-0 SEA

vs.

PIERCE COUNTY,

Defendant.


ORDER DENYING PLAINTIFF'S
MOTION TO MODIFY ORDER AND
SUPPLEMENT RECORD

~~(PROPOSED)~~

THIS MATTER coming on to be heard before the undersigned Judge of the above-entitled Court based upon the motion of Plaintiff Curtis A. Beaupre to modify the Court's Order of June 15, 2006 and to supplement the record, and the Court having reviewed the files and records herein, it is hereby:

ORDERED, ADJUDGED AND DECREED that said motion is DENIED.

DONE this 21st day of November, 2006.


JUDGE

1 Presented by:

2 GERALD A. HORNE

3 Prosecuting Attorney

4 By 

DANIEL R. HAMILTON

5 Deputy Prosecuting Attorney

6 Attorneys for Pierce County

7 WSBA #14658